



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2619**

**Appeal PA07-83**

**York University**



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## **NATURE OF THE APPEAL:**

York University (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

... donation by [named donor] to York University (donor/endowment agreement),  
... restrictions and the contract associated with donation.

The University located the responsive record, an agreement between [named donor], York University and the York University Foundation. After notifying the named donor, who is a person whose interests may be affected by disclosure of the record, the University issued a decision letter to the requester, indicating that it was granting access to some of the record and denying access to the remainder. The denial of access was based on the application of the exemptions in sections 21 (personal privacy) and 18(1)(c) (economic and other interests) of the *Act*.

The requester, now the appellant, appealed this decision. During mediation, the appellant confirmed that he is only interested in section 3.01 of the record. This section is entitled “York Special Covenants”. The University is relying on section 18(1)(c) of the *Act* to deny access to this portion of the record.

As mediation was not successful, the file was transferred to me for adjudication, which takes the form of an inquiry under the *Act*. I sent a Notice of Inquiry to the University, setting out the facts and issues in this appeal and seeking its representations. I received representations from the University. I sent a copy of the University’s representations to the appellant, along with a Notice of Inquiry, seeking his representations. I did not receive representations in response from the appellant.

## **RECORD:**

The undisclosed information at issue consists of section 3.01 (York Special Covenants) of the agreement between [named donor], York University and the York University Foundation.

## **DISCUSSION:**

### **ECONOMIC AND OTHER INTERESTS**

The University has claimed that the discretionary exemption at section 18(1)(c) applies to the record. Section 18(1)(c) states:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

The University submits that:

[D]isclosure of that record could reasonably be expected to prejudice the economic interests and competitive position of York University.

All universities must compete for philanthropic gifts from individuals and corporations...

Negotiations with private donors must take place in confidence in order to secure the largest gifts possible. At times, donors want assurance that their gifts will be used for certain purposes and towards certain goals, as was the case with the [named donor] agreement. York University submits that disclosing confidential donor information could reasonably be expected to prejudice York University's ability to secure similar large gifts. This is analogous to the situation of for profit corporations and their donors.

### **Analysis/Findings**

Section 18(1)(c) is a harms based exemption where the onus rests on the party asserting the exemption to demonstrate that a reasonable expectation of harm exists. Whether the exemption applies is not specifically based on previous findings with respect to similar information, but

rests in large part on the quality of evidence provided by the party asserting the claim [Order PO-2569]. I have carefully reviewed the representations and the contents of the record and I conclude that the University has provided me with the kind of detailed and convincing evidence required to make a finding that the information at issue is properly exempt under section 18(1)(c).

Section 18(1)(c) provides the University with a discretionary exemption that can be claimed where disclosing information could reasonably be expected to prejudice the University in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the University, or adversely affect the University's ability to protect its legitimate economic interests [Order P-441, PO-2569].

Section 18(1)(c) does not require the University to establish that the information at issue belongs to the University, that it falls within any particular category or type of information, or that it has intrinsic monetary value [Order PO-2014-I].

The University submits that disclosure of the information in section 3.01 of the record would be prejudicial to its economic interests or competitive position. Section 3.01 contains the covenant the University made with the donor in order to secure the donation. I find that disclosure of this covenant could reasonably be expected to prejudice the University's ability to secure similar large donations.

Furthermore, the University must compete with other universities to attract substantial donations. I am satisfied that disclosure of the information contained in the record could reasonably be expected to provide competing universities with insight into the University's strategy in securing large donations, thereby prejudicing the competitive position of the University.

Therefore, subject to my discussion below concerning the University's exercise of discretion, I find that section 3.01 of the record is exempt by reason of section 18(1)(c).

### **EXERCISE OF DISCRETION**

The section 18(1)(c) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The University submits that:

In making its decision, the University considered the purpose of the *Act* and determined that its economic interests took precedence over the [appellant's] access rights in this case. The appellant is an individual unknown to the

University and to [the donor]. He is not seeking his own personal information, nor does he indicate a sympathetic or compelling need for the information.

York University submits that disclosure of the requested information will not increase public confidence in the operation of the institution; the record in question concerns a private matter between the University and one of its philanthropic donors. York University has already disclosed the non-prejudicial portions of the ... agreement to the appellant. York University regards the remaining requested information as highly confidential, proprietary, and commercially valuable, the publication of which could reasonably be expected to prejudice its ability to compete for gifts from private donors.

### **Analysis/Findings**

I find that the University exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. The undisclosed information in the record is significant to the University. The information provided to me does not support the view that disclosure of section 3.01 of the record will increase public confidence in the operation of the University, and accordingly, the University was not required to consider this factor. The appellant did not provide representations; as a result, I have no basis to conclude that he has a sympathetic or compelling need to receive this information. The appellant is not seeking access to his own personal information. The section 18(1)(c) exemption seeks to protect the interests of the University. Therefore, I am upholding the University's exercise of its discretion.

### **ORDER:**

I uphold the University's decision to deny access.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_  
October 22, 2007